to economic activity, as by maintaining good roads, sound public education, or low taxes." *West Lynn Creamery*, 512 U.S. at 199 n.15. The Court has further explained that "'[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." *Id.* (quoting *New Energy Co.*, 486 U.S. at 278).

1. Ohio's ITC provides a nonrefundable credit of either 7.5% or 13.5% against the State's corporate franchise tax[2] if a taxpayer "purchases new manufacturing machinery and equipment during the qualifying period, provided that the new manufacturing machinery and equipment are installed in" the State. Ohio Rev. Code Ann. § 5733.33(B)(1). To obtain the 13.5% credit, the investment must be made in localities which have been designated by the Ohio Department of Development as a "distressed area," "labor surplus area," "inner city area," or a "situational distress area." *Id.* § 5733.33(A)(9).

2. The parties below did not dispute that Ohio's ITC has "a sufficient nexus with the State," is "fairly apportioned,"

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[2] Ohio requires a franchise taxpayer to calculate both its net worth and net income tax bases and pay whichever amount results in the greater tax. Both bases are subject to apportionment under a formula which uses the ratios of three separate criteria: 1) the corporation's Ohio property to its property everywhere, 2) its Ohio payroll to its payroll everywhere, and 3) its Ohio sales to its sales everywhere. *See* Ohio Dep't of Taxation, *Annual Report 2004* 44 (2005). The property and payroll figures are weighted at 20%; the sales figure is weighted at 60%. *See id.* The three factors are then added and multiplied by the taxpayer's apportionable income to determine Ohio Apportioned Net Income. *See id.*

The taxpayer's "Ohio taxable (net) income is equal to the sum of nonbusiness income allocated to Ohio and business income apportioned to Ohio less Ohio net operating losses carried forward from an earlier year." *Id.* at 43. After multiplying the net worth and net income tax bases by the respective tax rates and determining which base results in the greater amount, the taxpayer subtracts any available credits to determine its tax liability. *Id.* at 45.

and is "related to benefits provided by the state." Pet. App. 4a (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Rather, the only issue in dispute is whether the ITC discriminates against interstate commerce.

Ohio's ITC does not discriminate against interstate commerce either on its face or in its practical effect. As the statute makes plain, the credit is available to all corporations doing business in Ohio that are subject to the State's franchise tax, without regard to whether they are domestic or foreign firms. *See* Ohio Rev. Code Ann. § 5733.33; *see also* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 43 (listing corporations not subject to the franchise tax). As even the court of appeals acknowledged, "the investment tax credit . . . is equally available to in-state and out-of-state businesses." Pet. App. 6a.[3]

Contrary to respondents' view, the ITC does not discriminate against interstate commerce by "favoring the other in-state economic interests (employees, suppliers, etc.) who benefit from in-state facilities." Resp. Br. in Resp. to Pets. for Cert. 9. As for suppliers, the Ohio law does not condition the ITC's availability on a firm's agreeing to purchase the qualifying machinery and equipment from Ohio firms. Rather, a firm remains free to purchase the machinery and equipment that comprise its investment from whatever manufacturer it chooses, whether the firm is located in Ohio, Michigan, Germany or South Korea.

Nor does the ITC discriminate in favor of Ohio residents in employment. The ITC does not require that the taxpayer hire

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[3] The suggestion that Ohio's ITC discriminates against interstate commerce is also refuted by the facts of this case. DaimlerChrysler is incorporated under the laws of Germany, with its headquarters in Stuttgart, Germany. *See* DaimlerChrysler AG, *Memorandum and Articles of Incorporation* § 1 (June 2005) (English translation). DaimlerChrysler is not in any sense an in-state economic interest as that concept has been applied in this Court's Commerce Clause jurisprudence.

any Ohio residents to obtain the credit or give a preference to Ohio residents in hiring. Indeed, because DaimlerChrysler's plant is within commuting distance of Michigan and eastern Indiana, it is likely that a substantial number of its employees are not Ohio residents. Further, some employees might well have moved from other States to take jobs at the plant. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255-56 (1964) (movement of persons across states lines is interstate commerce). Far from discriminating against interstate commerce, the ITC promotes it.

Taken to its logical conclusion, respondents' theory would require the invalidation of a wide range of tax incentives including a State's decision to lower its generally-applicable tax rate. For example, in 1999 Ohio cut the rates applicable to both the corporate franchise tax's net worth and net income bases. *See* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 42. The purpose of these rate cuts may well have been to promote economic development within the State and thus "favor[] the other in-state economic interests (employees, suppliers, etc) who benefit from in-state facilities." Resp. Br. in Resp. to Pets. for Cert. 9. Indeed, the rate cuts may have provided a strong incentive for Ohio's corporate taxpayers to move more of their business activities into the State. But promoting economic development by lowering tax rates is no more discriminatory than any other measures which a State may enact to improve the business climate, such as spending on infrastructure or schools. It is far removed from the Commerce Clause's central concern of preventing a State from "benefit[ing] in-state economic interests by *burdening out-of-state competitors.*" *West Lynn Creamery*, 512 U.S. at 192 (quoting *New Energy Co.*, 486 U.S. at 273 (emphasis added)).

B. The Ohio ITC's Likely Practical Effect Is To Facilitate Interstate Commerce

1. "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Similarly, state laws which act as export tariffs also violate the Commerce Clause. *See, e.g., Tyler Pipe Indus. v. Washington State Dep't of Rev.*, 483 U.S. 232, 248 (1987) (invalidating state manufacturing tax which was assessed only on goods made in-state and sold to out-of-state customers).

These principles apply with equal force to state taxes on services. Thus, in *Boston Stock Exchange* the Court invalidated a tax which imposed a higher rate on security transfers involving out-of-state sales than on sales occurring within the State. *See* 429 U.S. at 335-36. More recently, the Court invalidated a property tax scheme which granted an exemption to summer camps that were operated principally for the benefit of state residents while denying the exemption to camps that principally sold their services to out-of-state residents. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568-69, 580-81 (1997). As the Court explained, the property tax scheme "functionally serve[d] as an export tariff that target[ed] out-of-state consumers by taxing the businesses that principally serve[d] them." *Id.* at 580-81.

The Ohio ITC is not a tariff and does not act as the functional equivalent of one. The ITC does not burden interstate commerce by either increasing the costs of goods and services sold by out-of-state firms to Ohio residents, *see, e.g., New Energy Co.*, 486 U.S. at 274, or by increasing the costs of goods and services sold by Ohio firms to out-of-state residents. *See, e.g., Camps Newfound*, 520 U.S. at 580-81. The ITC thus "does not affect the competition between in-

state and out-of-state business for a share of those markets." *See* Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 State Tax Notes 189, 193 (2005).

The court of appeals apparently accepted respondents' argument that the ITC "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." Pet. App. 6a. The court further reasoned that "as between two businesses, otherwise similarly situated and each subject to Ohio taxation, the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.*

This reasoning is erroneous on several counts. First, there is simply no merit to the contention that the ITC is coercive. Indeed, the court of appeals' reasoning is flatly inconsistent with respondents' assertion that "econometric studies have repeatedly demonstrated that the actual influence of state and local tax incentives on business location decisions are, at most, marginal, both because of the small size of state and local taxes relative to other business costs and because competing jurisdictions all offer competing incentives." Resp. Br. in Resp. to Pets. for Cert. 7.

If, as respondents argue, there is "no evidence that investment tax credits like Ohio's are significant factors in business location decisions," *id.*, then there is no basis for the court of appeals' conclusion that Ohio's ITC "coerc[es] businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." Pet. App. 6a. Indeed, a prospective investor may find that another State offers just as favorable a deal – if not a better one – than Ohio does. Yet the court of appeals totally ignored this possibility.

Moreover, there are many factors that influence an investment decision, such as the cost of housing, the quality of schools, roads, and telecommunications networks, labor laws, wage levels, the availability of workers with the necessary skills, and access to raw materials. A rational investor could conclude that the balance of these factors in a given case outweighs the value of the tax incentives offered by Ohio. Thus, while the Ohio ITC may provide a strong incentive for many investors, it is not an offer which no investor can refuse.

The court of appeals also ignored the axiom that the purpose of the dormant Commerce Clause is to "protect markets and participants in markets, not taxpayers as such." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). The ITC is available only for investing. It is not based on the value of the taxpayer's activity in manufacturing, producing, exporting or selling of a good or service. As a consequence, it is too far removed from the stream of commerce in automobile manufacturing and sales to be deemed a burden on interstate commerce. *See West Lynn Creamery*, 512 U.S. at 202 (Commerce Clause prohibits "the imposition of a differential burden on any part of the stream of commerce—from wholesaler to retailer to consumer").

Camps Newfound, which involved a facially discriminatory tax exemption, does not support respondents. True enough, there "the discriminatory burden [was] imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer." 520 U.S. at 580. The record, however, "demonstrate[d] that the economic incidence of the tax [fell] at least in part on the campers." *Id.* *See also id.* at 581 ("Insofar as Maine's discriminatory tax has increased tuition, that burden is felt almost entirely by out-of-staters, deterring them from enjoying the benefits of camping in Maine.") The Court concluded that "the Maine statute therefore functionally serves as an export tariff that targets out-of-state consumers by taxing the

businesses that principally serve them[,]" *id.* at 580-81, and held that the provision violated the Commerce Clause.

In contrast, no such showing has been made here. None of DaimlerChrysler's competitors has challenged the credit.[4] Nor is there any evidence that the Ohio franchise tax acts as the functional equivalent of an export tariff which, while paid by Ohio corporate taxpayers, is passed on to out-of-state consumers who purchase goods made in Ohio.

Indeed, while there is no record here, the ITC likely functions in a manner that promotes interstate commerce. For example, the ITC lowers DaimlerChrysler's costs of acquiring manufacturing equipment by providing what is in effect a 13.5 percent discount on the purchase price. But as explained above at p. 8, *supra*, there is no requirement that this equipment be made in Ohio or sold by Ohio firms. Rather, a firm can purchase the equipment from any manufacturer throughout the United States and the world. Quite the opposite of an import tariff, the Ohio ITC promotes interstate and foreign commerce.

The ITC may also function as an export subsidy. The ITC lowers DaimlerChrysler's costs of manufacturing vehicles at the Toledo plant. Competition in the market for similar vehicles may force DaimlerChrysler to lower its prices for the Toledo-made vehicles which it undoubtedly sells in other States. In contrast to the tax scheme at issue in *Camps Newfound*, *see* 520 U.S. at 568, Ohio has not conditioned the availability of the ITC on DaimlerChrysler's agreeing to sell its product (or even a certain percentage of it) to Ohio residents. Thus, the tax incentive may have the exact opposite effect of an export tariff. Instead of the State passing the tax

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[4] On the contrary, the Ford Motor Company, General Motors Corporation, and Nissan North America, Inc.—three of DaimlerChrysler's competitors—filed briefs *amicus curiae* in support of DaimlerChrysler's petition for certiorari in Case No. 04-1704.

burden on to out-of-state consumers, Ohio residents may be subsidizing non-resident consumers of DaimlerChrysler's products.

Finally, even if competition does not force DaimlerChrysler to lower its prices and the company is able to retain the tax credit as profit, the ITC—which is available to any firm without regard to the place of its incorporation or principal place of business—does not violate the Commerce Clause. Nothing in this Court's dormant Commerce Clause jurisprudence prohibits a State from subsidizing the profits of an out-of-state corporation. *See* p. 8 n.3, *supra.*

The likely practical effects of Ohio's ITC on interstate commerce are thus far different from those of the measures invalidated by the Court in *Maryland v. Louisiana* and *Boston Stock Exchange*. In *Maryland v. Louisiana*, the Court struck down Louisiana's First-Use Tax on natural gas imported into the State, which was extracted principally from the Outer Continental Shelf. Under the scheme, Louisiana imposed the tax on such activities as sales, processing, or transportation within the State. *See* 451 U.S. at 732. Louisiana granted several exemptions from the First-Use Tax as well as credits applicable to other taxes. *See id.* at 733. The Court summarized the scheme as follows: "Louisiana consumers of OCS gas for the most part are not burdened by the Tax, but it does uniformly apply to gas moving out of the State." *Id.*

To be sure, the Court noted that the "economic effect of [Louisiana's] Severance Tax Credit is to encourage natural gas owners involved in the production of OCS gas to invest in mineral exploration and development within Louisiana rather than to invest in further OCS development or in production in other States." *Id.* at 757. The Court, however, observed that under the scheme,

> Louisiana consumers of OCS gas are . . . substantially protected against the impact of the First-Use Tax and have the benefit of untaxed OCS gas which because it is

> not subject to either a severance tax or the First-Use Tax may be cheaper than locally produced gas. OCS Gas moving out of the State, however, is burdened with the First-Use Tax.

Id. at 757-58.

Accordingly, it was clear that the Louisiana scheme acted as an export tariff because while in-state consumers were exempt from taxation, out-of-state users were not. The Louisiana scheme thus discriminated against out-of-state consumers and violated the Commerce Clause's fundamental purpose. The case therefore provides no authority for invalidating Ohio's ITC.

Neither does *Boston Stock Exchange*, which invalidated a New York transfer tax on security sales. Under the New York scheme, non-residents selling on out-of-state exchanges a security that was delivered or transferred in New York were subject to double the tax applicable if they sold the security on a New York exchange. *See* 429 U.S. at 330. Moreover, taxpayers (without regard to their residency) who sold their securities on New York exchanges were subject to a maximum tax of $ 350 while those who sold their securities on non-New York exchanges were subject to the per share tax without limitation. *See id.* at 330-31.

Under the New York tax scheme, a seller of securities delivered or transferred in New York could not "escape tax liability by selling out of State, but [could] substantially reduce [its] liability by selling in State." *Id.* at 331.[5] As the Court recognized, "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges." *Id.* According to the Court, the tax "foreclose[d] tax-neutral decisions and cre-

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[5] As explained at pp. 12-14, *supra*, a tax on sales operates in a fundamentally different manner than the Ohio ITC.

ate[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." *Id.*

The Court held that the New York scheme violated the Commerce Clause, observing that "New York's discriminatory treatment of out-of-state sales is made possible only because some other taxable event (transfer, delivery, or agreement to sell) takes place in the State. Thus, the State is using its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home State." *Id.* at 336 (internal quotations omitted). In the Court's view, the scheme diverted "the flow of security sales . . . from the most economically efficient channels . . . to New York" and caused the "diminution of free competition," thus violating the free trade purpose of the Clause. *Id.*

Notwithstanding the broad language of various portions of the opinion, the Court made clear that its holding was a limited one. It invalidated the New York scheme because it functioned as a tariff on the sale of securities sold on non-New York exchanges:

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. *We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.*

Id. at 336-37 (emphasis added).

Boston Stock Exchange thus does not support invalidation of the Ohio ITC, which as explained above, *see* p. 10, *supra*, does not discriminatorily tax products made or services performed in another State. Moreover, the Court's opinion makes plain that the notion of tax neutrality is nothing more than a prohibition against taxes that function as tariffs. It is

not a license for federal courts to analyze the economic efficiency of state tax policies. In short, the Commerce Clause does not impose on the States the principle of *laissez-faire* economics. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.").

2. Beyond its failure to examine the practical effects of Ohio's ITC on the relevant market, *see West Lynn Creamery*, 512 U.S. at 201, the court of appeals also erred when it accepted the contention that two firms are "similarly situated" when one makes an investment in Ohio and the other makes the investment in another State. *See* Pet. App. 6a. Based on this assumption, the court apparently concluded that the ITC discriminates against interstate commerce because "the business that chooses to expand its [Ohio] presence will enjoy a reduced tax burden, based directly on its new in-state investment, while a competitor that invests out-of-state will face a comparatively higher tax burden because it will be ineligible for any credit against its Ohio tax." *Id.*

The court's reasoning is erroneous because once the two firms make their investments they are no longer similarly situated. The firm that invests in Ohio necessarily increases the amount of its Ohio property and payroll and thus increases the numerator of its property and payroll factors in the apportionment formula. *See* Ohio Dep't of Taxation, *Annual Report*, *supra* n.2, at 44 (Ex. 2). As a result, the amount of the firm's net income (or net worth in the event the firm has no net income) which is apportioned to Ohio increases, with a concomitant rise in the firm's Ohio tax liability.

In contrast, the firm that invests in another State increases the amount of the denominator of the apportionment formula's property and payroll factors and thus frequently decreases the ratio of the property and payroll factors. *See id.* The result is that when a corporation invests in another State,

less of the corporation's net income or net worth is apportionable to Ohio and its Ohio franchise tax liability decreases.

As the foregoing demonstrates, the act of investing has substantial consequences for each hypothetical firm's Ohio franchise tax liability. The firm that invests in Ohio increases its Ohio franchise tax liability; the firm that invests in another State decreases its Ohio franchise tax liability. Because the act of investing changes the tax base of each firm, they are not similarly situated and no claim of discrimination is sustainable.[6]

This conclusion is fully supported by the Court's decision in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). *Westinghouse* involved a challenge to a New York franchise tax credit granted to Domestic International Sales Corporations (DISCs), entities authorized by the Internal Revenue Code to engage in export sales whose income was attributable to their shareholders. *See* 466 U.S. at 390-91. Like the Ohio franchise tax, the New York tax apportioned income to the State based on a formula that used the ratios of a taxpayer's New York-based property, payroll and receipts to its worldwide figures. *See id.* at 394 n.5.[7]

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[6] The court of appeals' suggestion that Ohio discriminates against interstate commerce because it does not provide a tax credit for investments made in another State is erroneous for another reason. Ohio is prohibited from taxing income that lacks "a substantial nexus" to the State, *Complete Auto*, 430 U.S. at 279, and "may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quoting *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982)). It would be incongruous to require a State to grant a taxpayer a credit for economic activity undertaken by a taxpayer when the State has no authority to tax income generated in that jurisdiction.

[7] Because New York did not impose the franchise tax on income distributed by a subsidiary to its parent, DISCs would not have been subject to New York tax. *See id.* at 392. New York thus enacted legislation which required that a DISC's receipts, assets, expenses and liabilities be attributed to its parent. *See id.* at 393.

The New York legislature recognized that "state taxation of DISCs would discourage their formation in New York and also discourage the manufacture of export goods within the State." *Id.* at 392-93. New York thus enacted the credit, but limited it "to gross receipts from export products 'shipped from a regular place of business of the taxpayer within [New York]." *Id.* at 393 (other citation omitted).[8] Most significantly, the calculation of the credit was based in part on the ratio of a DISC's gross receipts of exports shipped from New York to its total gross receipts of exports.

The Court held that the credit violated the Commerce Clause. Central to the Court's conclusion was the fact that the credit was adjusted to reflect the DISC's New York export ratio. *See id.* at 399-400. Basing the credit on the New York export ratio had the dual effects "of allowing a parent a greater tax credit on its accumulated DISC income as its subsidiary . . . move[d] a greater percentage of its shipping activities into the State," and of "decreas[ing] the tax credit allowed to the parent . . . as the DISC increase[d] its shipping activities in other States." *Id.* at 400. As the Court emphasized,

> It is this second adjustment [for the export ratio], made only to the credit and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISC's shipping activities conducted from New York.

Id.

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[8] The credit was calculated by dividing the DISC's gross receipts of exports shipped from New York by its total gross receipts from exports and multiplying it by the taxpayer's New York allocation percentage, then multiplying that figure by the applicable tax rate, then multiplying that figure by 70 percent, and finally multiplying that figure by the DISC's accumulated income which was attributable to the parent. *See id.* at 393-94 (citations omitted).

The New York credit thus went beyond "provid[ing] a positive incentive for increased business activity in New York State." *Id.* at 401 (internal quotation and citation omitted). Indeed, "it *penalize[d]* increases in the DISC's shipping activities in other States." *Id.* (emphasis added). And because the export ratio was based "on an activity not included in the tax base, the credit inversely apportioned the tax to the jurisdiction, and, thus, discriminated on its face against interstate commerce." Firestone, 36 State Tax Notes at 194. The credit therefore "operated as a tariff on export shipping." *Id.*

It is significant that in *Westinghouse* "the tax base [of the franchise tax] was determined without regard to export shipping," and thus "in-state and out-of-state exporters were similarly situated in relation to the tax." *Id.* at 192. This was so because "[b]oth in-state and out-of-state exporters could have the identical three-factor formulas, have the same base taxable income figures and, therefore, be similarly situated under the tax, but the one who engage[d] in export shipping from outside of the state would be taxed at a higher effective rate." *Id.* at 194.

The Ohio tax scheme has no such defect. As explained above, the taxpayer who invests in Ohio increases both its property and payroll factors and thus increases the amount of its worldwide income that is subject to Ohio taxation. The taxpayer who invests elsewhere, however, decreases its Ohio property and payroll factors and thus decreases the amount of its worldwide income that is subject to Ohio taxation. The two taxpayers are therefore not similarly situated. And the Ohio scheme does not penalize the taxpayer who chooses to invest elsewhere.

3. Respondents argue that corporate tax credits do not result in net job creation, that they shift the costs of government from corporations "to other classes of taxpayers," Resp. Br. in Resp. to Pets. for Cert. 6, and that they have caused "a substantial reduction in states' and localities' ability to deliver

important public services." *Id.* (citations omitted). Respondents also contend that competition between States for new business investment has become destructive. *See id.* at 5-6.

These arguments are nothing more than policy disagreements masquerading as a constitutional claim. As shown above, the legal resolution of this case is clear—Ohio's ITC does not violate the Commerce Clause. The political branches (including Congress) and not the courts are therefore the proper forums for debating the merits of respondents' critique of state investment tax credits.

CONCLUSION

The judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *Petitioner*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

WILLIAM W. WILKINS, ET AL., *Petitioners*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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IN THE

Supreme Court of the United States

No. 04-1704

DAIMLERCHRYSLER CORPORATION, *Petitioner*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

No. 04-1724

WILLIAM W. WILKINS, ET AL., *Petitioners*,

v.

CHARLOTTE CUNO, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF NISSAN NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Ohio, like virtually all States, offers tax benefits and related incentives to both in-state and out-of-state businesses in order to foster local economic development and create jobs for state residents.[1] In particular, Ohio has enacted an investment tax credit ("ITC") that grants a non-

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

refundable credit against the State's corporate franchise tax to any taxpayer that "purchases new manufacturing machinery and equipment" during a qualifying period and installs the equipment in Ohio by a particular date. Ohio Rev. Code § 5733.33(B)(1). *See* 04-1704 Pet. App. 38a.

Amicus curiae Nissan North American, Inc. ("Nissan") has a direct and substantial interest in this case, in which the Sixth Circuit held that the Ohio ITC violates the Commerce Clause, U.S. Const., art. I, § 8, cl. 3. Nissan is a global automobile company headquartered in Japan with major operations in North America, including operations within the Sixth Circuit. Nissan's plant in Smyrna, Tennessee, covers more than five million square feet and is one of the largest automobile production plants under one roof in the United States. Nissan manufactures more than 500,000 vehicles at the Smyrna plant each year, including its Xterra and Pathfinder SUVs, Frontier pickup trucks, Maxima sport sedans, and Altima mid-size sedans. As discussed below, *see infra* at 24-27, Nissan's Smyrna plant and its manufacturing facility in Decherd, Tennessee, have resulted in the investment by Nissan of billions of dollars in infrastructure and equipment in Tennessee as well as the creation of more than 10,000 high wage-paying jobs.

Nissan receives tax incentives from the State of Tennessee based, in part, on the extent of its investment in Tennessee and the full-time workers it employs there.[2] These incentives are part of a coordinated effort by the State to encourage the investment of high wage industries in new plants and equipment in Tennessee. Not only does that effort enjoy strong popular support, it has produced enormous economic dividends for the State. Although the Tennessee incentive scheme differs from the Ohio ITC invalidated by the Sixth

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[2] *See* Tenn. Code § 67-4-2009(4)(A) (providing excise tax credit of 1% percent of purchase price of industrial machinery purchased during tax period and located in Tennessee); *id.* § 67-4-2109(c)(2)(A) (providing $2,000 job tax credit against franchise and/or excise tax liability for each net new full-time employee hired in Tennessee).